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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 372

THE UNITED STATES PRINTING & LITHOGRAPH COMPANY,

Petitioner,

v.

GRIGGS-COOPER & COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER.

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Respondent in its brief undertakes to sustain the judgment of the Supreme Court of Ohio not only for the reasons set forth by that court in its opinion (Record 7), but for the further reason that the customers for whom the petitioner printed labels had sold their products in the same territory in which the respondent was engaged in business.

It is claimed (respondent's brief 2 and 3) that the original petition in the trial court alleged that the labels published and sold by the petitioner to its customers were used by such customers as a trade mark in the sale by them of their goods in the same territory in which the respondent

sold its goods, to-wit, in the States of Minnesota, Wisconsin, North and South Dakota, Montana and Washington. It is claimed that the answer of the petitioner in the trial court did not put in issue this allegation.

In the first place, petitioner contends that the allegation of the petition, which is referred to, was put in issue. The answer denies that petitioner had printed, published and sold labels bearing the word "home," with the knowledge that their use by its customers would lead to confusion and mistake in the minds of the public, and that the printing, publishing and selling of said labels had enabled its customers to substitute and palm off their goods as the goods of the petitioner, or to the damage of the respondent (Record 43). This was the only denial that petitioner could have made. It was being charged as a contributory infringer, and it would have been necessary, in order to make it a contributory infringer, to show that it had sold these labels with a knowledge that they were to be used in infringement of the respondent's trade mark.

The stipulation which the parties entered into (Record 45) does not contain any statement of fact in support of the averment of the petition, now relied on by respondent. The stipulation (Record 48) states that the respondent was selling its commodities in the States of Minnesota, Wisconsin, Iowa, North Dakota, South Dakota, Montana and Washington, and that its trade did not extend beyond said territory. It further stipulates (Record 45) that the petitioner printed, published and sold labels, true copies of which were attached, and the names of the parties to whom the labels were sold and their places of business are set out on pages 46 and 47 of the Record; none of them are in the States in which the respondent does business.

The point now sought to be raised in this court by the respondent in order to sustain the judgment, apparently was not raised in any of the courts of Ohio, so far as this

record is concerned. The decree of the Court of Common Pleas of Hamilton County, Ohio, which was the trial court, is found on pages 27 to 33 inclusive of the Record. It contains a finding of the facts on which its decree is based. It was found by the court in this decree that the trade of the respondent did not extend beyond the States of Minnesota, Wisconsin, Iowa, North Dakota, South Dakota and Washington (Record 27). It was also found that this petitioner printed, published and sold to its customers, in certain other States, labels upon which the word "home" appeared in combination with some other word, but there is no finding that the customers, to whom petitioner sold labels, had sold their goods in any of the States in which the respondent was selling its goods (Record 32). The court further found (Record 31) that the respondent was, at the time of the filing of its petition, entitled to the exclusive use of its trade mark not only in the territory in which it was selling its goods, but "by the aforesaid registrations under the Trade Mark Act of 1905 the rights of the plaintiff in the trade mark were extended to cover commerce among the States, other than the several States where the trade of the plaintiff has been established." This was the rule of law on which the judgment of the trial court was founded.

In the Court of Appeals (an intermediate court in Ohio) to which the case was taken, the final judgment and decree also contains a finding of facts and of the proposition of law, above referred to, in practically the same language as the trial court (Record 18 to 25). There is no finding in that court that the customers, to whom the petitioner had sold labels, had sold their goods in the same territory as the respondent, and that court did not base its judgment on such facts. That court likewise found that under the Trade Mark Act of 1905, the rights of the respondent in this case were extended to cover commerce among the

States other than the several States where its trade had been established (Record 23).

In the Supreme Court of Ohio the judgment entry (Record 6) affirms the judgment of the Court of Appeals. The opinion of the court sets forth the facts, as they were understood by the court, and also the propositions of law that were determined (Record 7 to 17). Respondent's claim that the labels sold by petitioner, as aforesaid, are used by its purchasers in the sale of goods by them in the same territory in which respondent sold its products, conflicts with this statement in the opinion of the court, viz., "However, it is not disclosed whether the commodities of the business concerns to whom the defendant furnishes said labels, and the plaintiff's goods, bearing its label, are sold in the same market." (Record 12.)

The case throughout was tried upon the sole question of whether the rights of the respondent in its trade marks were extended by virtue of the Trade Mark Act of 1905 into States in which it had made no sales and in advance of its trade in those States (Record 16).

The respondent now seeks to claim that the judgment of the Ohio courts was right even though the reasons may be wrong, but the case which the respondent now seeks to make in this court, insofar as the point is concerned, was not the case which the Ohio courts had before them and decided.

We submit, therefore, that in the state of the record the sole question before this court is the one decided by the Supreme Court of Ohio in its opinion and argued in our original brief.

Respectfully submitted,

Frank F. Dinsmore and Walter F. Murray,
Of Counsel for Petitioner.